1989

State of Utah v. Charles Webb : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 890256-CA
v.	:	
CHARLES WEBB,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1978), IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals from his conviction of Aggravated Robbery, a first degree felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah. Jurisdiction is conferred on this Court pursuant to Utah Code Ann. §78-2a-3(2)(j) (Supp. 1989).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether defendant was afforded effective assistance of counsel where both he and co-defendant were independently represented by counsel from the Salt Lake Legal Defender Office?

2. Whether there was sufficient evidence at trial to support defendant's conviction for Aggravated Robbery?

3. Whether the alleged prosecutorial conduct amounted to cumulative error justifying a new trial?

4. Whether the trial court properly admitted evidence seized during the arrest of the defendant?

5. Whether the firearm enhancement penalties were properly applied to defendant?

6. Whether Jury Instruction No. 16 was a proper statement of law applicable to the evidence?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The full text of the constitutional provisions, statutes, and rules are set forth in the argument and therefore need not be restated here.

STATEMENT OF THE CASE

Defendant, Charles Webb, was charged with Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1978). Defendant was convicted by a jury on June 22, 1988, in the Third Judicial District Court, Salt Lake County, the Honorable James S. Sawaya, Judge, presiding. Judge Sawaya sentenced defendant to a prison term of five years to life with a mandatory one year firearm enhancement and a discretionary five year enhancement each to run consecutively (R. 282).

STATEMENT OF FACTS

At approximately 3:30 p.m. on October 21, 1987, an armed man held the owner of King's Custom Jewelers, Karekine Karmelian, and a Trolley Square security guard, Stephen Church, at gunpoint as he robbed the store of jewelry, diamonds, and cash, valued at $40,000 to $42,000 (T. 83-84, 89-90, 102, 174). During the robbery, the man pulled a sawed-off shotgun from a cloth bag and directed Mr. Karmelian to empty the jewelry, diamonds, and cash from the safe and display cases and put them in the bag (T. 84, 89-93, 121, 125-129, 150). Before leaving the jewelry store, the robber commented that they should not try to follow him because he had another guy waiting outside for him with a gun (T. 103).

Although Mr. Karmelian and Mr. Church gave varying descriptions of the robber, both positively identified co-defendant John E. Humphrey as the armed robber (T. 85, 132-33, 136-37, 142, 187-188, 190, 211-12, 214). Both witnesses also identified Exhibit #1, the shotgun subsequently seized from the defendant's home, as similar to the one used in the robbery (T. 155, 189).

Britt Martindale testified that at approximately 4:00 p.m. on the same day, defendant and Renee Gregersen backed into her driveway (T. 225-226). Defendant went into the Martindale home, took a blanket off of Britt's waterbed, and told her to go outside with him and hold up her side of the blanket behind the trunk of the car (T. 227-228, 273, 278). Defendant then told Gregersen to hit the trunk button and when the trunk opened, Britt saw co-defendant Humphrey in the trunk (T. 228, 278, 279). Humphrey, who was living at the Martindale home at the time, went straight into the bathroom and shaved off his beard (T. 229, 280). Meanwhile, defendant retrieved a canvas bag and a 12-gauge sawed-off shotgun with black tape around the handle (T. 230-31). Britt identified Exhibit 1 as the shotgun defendant carried into her house (T. 284).

Defendant and Gregersen sorted through the jewelry taken from the bag (T. 232). Humphrey walked back and forth between the bathroom and the kitchen while shaving and explaining "how he put the shotgun in some guy's face" and handcuffed a guard who arrived during the robbery (T. 237). Defendant exclaimed that "everything went great," that "the cops didn't

show up" for a while, and that he knew everything was okay when "all he saw was an old man coming over a fence." (T. 237.) Later that day, defendant, Martindale, Humphrey and Russell left for Las Vegas (T. 241).

Britt testified she knew Russell had stolen a car, but denied knowing it was to be used to facilitate the robbery (T. 252). Russell was granted immunity for stealing the car in return for his testimony (T. 402-3). He testified that defendant told him he would pay the rent on Russell's house if he would steal a car for him (T. 408). Defendant told Russell that he knew someone in Las Vegas that could get rid of the items that he and Humphrey had stolen (T. 405).

On November 2, 1987, the police received a tip that Britt Martindale knew something about the robbery (T. 295-96, 330). Based on a statement Britt gave to Detective Harvey Jackson of the Salt Lake City Police Department on November 3, 1987, the police obtained an arrest warrant for defendant, Humphrey, and Gregersen (T. 330, 334-6, 650).

At 7:30 a.m. on November 4, 1989, the police arrived at the Webb/Gregersen home to execute the arrest warrants (T. 663). Approximately ten officers were present because of the belief that the suspects were armed (T. 650-51, 685). With guns drawn, the police knocked on the door which was opened by Gregersen's teenage boy (T. 665, 672). Once the door opened, the police identified themselves and moved the boy out of the way against the wall (T. 665, 672). Gregersen was in the living room with her infant and was still dressed in her night clothes (T. 652,

665). Gregersen was handcuffed and placed on the floor for approximately 6-7 minutes until the premises were secured (T. 659-60, 673). Because of her concern for her infant son who was crying on and off, the infant was placed in a playpen next to her (T. 659, 673). In one of the bedrooms, the police arrested defendant and recovered a sawed-off shotgun from under the bed (T. 669, 675). Humphrey was arrested in another bedroom (T. 665). The suspects were then shown the arrest warrants on the charge of Aggravated Robbery (T. 666).

With Gregersen's consent, the police searched the house and took into evidence some jewelry, a shotgun, miscellaneous paperwork, and some clothing and papers from a vehicle (T. 655). Gregersen's purse was searched for weapons incident to her arrest and a diamond watch was observed which she later told police came from this robbery (T. 671). Mr. Karmilian testified that the watch and a ring recovered from the Webb/Gregersen house were among those items stolen from his store on October 21, 1987 (T. 111).

SUMMARY OF ARGUMENT

Defendant was not denied effective assistance of counsel where no actual conflict of interest was established between defendant's counsel and co-defendant's counsel, both of whom were members of the Salt Lake Legal Defender Association.

The evidence was sufficient to support defendant's conviction for Aggravated Robbery. The record evidence clearly establishes that defendant was a party to the offense.

No substantial prosecutorial misconduct occurred which would justify a new trial on the theory of cumulative error.

The trial court did not abuse its discretion in denying defendant's Motion to Suppress Evidence where the police did not unlawfully break a door in entering the residence and the evidence was seized pursuant to a weapons search incident to arrest, a protective sweep of the premises, and a voluntary consent search. Further, defendant has no standing to contest the seizure of a watch and ring where he did not have a legitimate expectation of privacy in the area searched.

Defendant was properly sentenced to a firearm enhancement term where the legislature clearly intended to impose an enhanced penalty for Aggravated Robbery when accomplished by use of a firearm. However, the trial court erred by imposing an enhancement term of six years rather than a maximum term of five years.

Viewing the jury instructions as a whole, the jury was not misled by Jury Instruction #16 which simply tailored the law to the evidence presented at trial.

ARGUMENT

POINT I

DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO AN ALLEGED CONFLICT OF INTEREST.

A. Federal Constitutional Analysis.

Defendant argues that he was denied the effective assistance of counsel under the Utah and federal constitutions due to a conflict of interest affecting his trial attorney's

performance. He claims that an inherent conflict existed because his counsel and co-defendant's counsel were both from the Salt Lake Legal Defender Association.

Recently, the Utah Supreme Court reaffirmed its adherence to the Strickland standard for ineffective assistance of counsel. State v. Carter, 108 Utah Adv. Rep. 12, 15 (S. Ct. 5/12/89); Strickland v. Washington, 466 U.S. 668 (1984). In order to prevail on an ineffectiveness claim, a defendant "must show, first, that his or her counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment, and, second, that counsel's performance prejudiced the defendant." Carter, 108 Utah Adv. Rep. at 15, citing, Strickland, 466 U.S. at 687-88.

The Strickland court held that the appropriate test for prejudice is that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 446 U.S. at 695. See also, State v. Carter, 108 Utah Adv. Rep. 12, 15 (S. Ct. 5/12/89). Failure to show either deficient performance or resulting prejudice will defeat a claim of ineffective counsel. State v. Geary, 707 P.2d 645, 646 (Utah 1985).

Applying the ineffective assistance of counsel test to a claim of conflict of interest, the United States Supreme Court uses two different approaches depending on the procedural

setting. The first is used when a potential conflict is brought to the attention of the court before trial. Holloway v. Arkansas, 435 U.S. 475 (1978). Once notified, the court must take adequate steps to remedy the problem so that the defendant is not deprived of effective assistance of counsel. People v. Jones, 121 Ill.2d 21, 111 Ill.Dec. 164, 520 N.E.2d 325, 329 (1988), citing, Holloway, 435 U.S. 475.

The second approach is employed when a conflict is not alleged until after trial and requires the defendant to show that an actual conflict of interest existed at trial that adversely affected his counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 349 (1980). A defendant "bears the burden of establishing the inadequacy or ineffectiveness of counsel, and proof of such must be a demonstrable reality and not a speculative matter." State v. McNichol, 554 P.2d 203, 204 (Utah 1976).

In the present case, defendant did not raise a conflict of interest claim between his counsel and co-defendant's counsel until his Motion for a New Trial (R. 287-88, T. 739). Defendant improperly infers in his brief that his pre-trial Motion to Sever, which was made by his privately retained counsel, should have alerted the court to a conflict of interest (R. 82). (Br. of App. at 14.) However, the motion merely states that defendant believed that substantially more evidence would be introduced against co-defendant Humphrey than himself and that he would be prejudiced in the eyes of the jury due to guilt by association (R. 82).

Likewise, defendant Humphrey's pro se Motion for Conflict of Interest and Trial Separation states that defendant Webb will be deprived of a fair trial because more evidence would be introduced against Humphrey (R. 98). The conflict of interest raised by Humphrey appears to be between he and his attorney, not between the attorneys from the Salt Lake Legal Defender Association.

In his brief, defendant concedes that he was not entitled to a severance as a matter of right and does not raise the issue on appeal. (Br. of App. at 14). Rather, defendant claims that because of the joint representation by Legal Defenders, he was precluded from pursuing a defense on the theory that Humphrey was the guilty party, and that he was simply being drawn into the crime by association. (Br. of App. at 15). Defendant speculates that had his attorney pursued an antagonistic defense rather than a defense based on mutually corroborating claims of innocence, the result would likely have been different.

The Utah Supreme Court reviewed the issue of a legal defender association representing co-defendants with alleged conflicts of interest in State v. Heaps, slip op. No. 16264 (S. Ct. filed October 31, 1979) (unpublished). (See Addendum "A"; Opinion.). Heaps rejected the defendant's claim that he was denied effective assistance of counsel due to his co-defendant being represented by the same legal defender association. The Court ruled:

> Significantly, the defendant never asked for different counsel at any time during the

> pre-trial proceedings and he never registered any dissatisfaction with the performance of his counsel until after he was convicted and sentenced. Although the defendant claims there was conflict of interest, he does not specify what it was, other than the fact that he was "represented in pre-trial proceedings by the Legal Defender's Association, who also represented the untried co-defendant" and that this "may require" reversal of his conviction and a new trial.
>
> To prevail on his claim, it would be necessary for it to appear that there was a conflict of interest which in some manner may have reacted to the defendant's detriment. Nothing of that character appears in this case and none can be presumed merely because different attorneys from the Legal Defender's Office had represented defendant.

Slip op. at page 2. Thus, a legal defender association is not per se prohibited from representing co-defendants whose interests may be in conflict and an appellant must show an actual detrimental conflict existed in the record. Id.[1]

In State v. Barella, 714 P.2d 287 (Utah 1986) the Utah Supreme Court again addressed the issue of whether a conflict existed where the Legal Defender's Office represented co-defendants. The court held that the defendant was not denied effective assistance of counsel where the claim of conflct was merely speculative. Barella, 714 P.2d at 288-89, citing State v. Jelks, 105 Ariz. 175, 461 P.2d 473 (1969); and United States v. Lugo, 350 F.2d 858 (9th Cir. 1965).

Similarly, in Batchelor v. Smith, 555 P.2d 871 (Utah 1976), the Utah Supreme Court held that there "is no just reason

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[1] Accord State v. Jelks, 105 Ariz. 175, 461 P.2d 473 (1969); State v. Gutierrez, 116 Ariz. 207, 568 P.2d 1105 (Ariz. App. 1977); and State v. Gross, 221 Kan. 98, 558 P.2d 665 (1976).

to accuse an attorney of incompetence simply because she may be the spouse of another attorney who is in the case; and this is especially true where both attorneys are striving to thwart the efforts of the prosecuting attorney." Batchelor, 555 P.2d at 872. The court opined that the seeds of ineffectiveness of counsel claims "have often fallen in fertile judicial soil. It seems to be the last refuge of those who make no claim of innocence but have a burning yen to escape from the penalties provided by law for their criminal conduct." Batchelor, 555 P.2d at 871-72.

Defendant relies on several authorities holding that an actual conflict of interest exists when co-defendants are jointly represented. However, many of these cases are factually distinguishable in that a single attorney represented more than one defendant with conflicting interests.[2] A number of courts have held that two attorneys appointed from the Legal Defender's Association may individually represent co-defendants in the same trial where no conflict of interest is shown.[3]

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[2] Defendant cites the following: Holloway v. Arkansas, 435 U.S. 475 (1978); State v. Smith, 621 P.2d 697 (Utah 1980); State v. Robinson, 662 P.2d 1341 (N.Mex. 1983); United States v . Martinez, 630 F.2d 361 (5th Cir. 1980); Cuyler v. Sullivan, 446 U.S. 335 (5th Cir. 1980); State v. Thompson, 108 Ariz. 500, 502 P.2d 1319 (1972).

[3] See State v. Rogers, 177 N.J.Super. 365, 426 A.2d 1035 (1981); Hernandez v. Mondragon, 824 F.2d 825 (10th Cir. 1987); Richardson v. State, 439 N.E.2d 610 (Ind. 1982); Averhart v. State, 470 N.E.2d 666 (Ind. 1984); People v. Dallas, 40 Ill. Dec. 110, 85 App.3d 153, 405 N.E.2d 1202 (Ill. App. Ct. 1980); State v. Bell, 90 N.J. 163, 447 A.2d 525 (1982); State v. Robinson, 99 N.M. 674, 662 P.2d 1341 (1983); Osborn v. Schillinger, 639 F.Supp 610 (D. Wyo. 1986), order affirmed by 861 F.2d 612 (10th Cir. 1988); Davis v. Franzen, 671 F.2d 1056 (7th Cir. 1982). But see Rodriguez v. State, 129 Ariz. 67, 628 P.2d 950 (1981).

Here, while defense counsel were associated with the same legal defender office, both defendant and Mr. Humphrey were represented by separate, competent, conflict-free counsel. As defendant notes in his brief, "what was presented to the jury was a united front where both defendants would succeed or fail together." (Br. of App. at 21.) This approach was simply a matter of trial strategy and was not objected to by defendant until after the jury's verdict of guilty. The record clearly shows that defendant's counsel enthusiastically advocated his cause in making numerous objections and motions.[4] It cannot be said that a "diminution in the zeal of representation" of defendant occurred from the joint representation of co-defendants by the same law association. (Br. of App. at 21.)

Both attorneys gave individual opening and closing arguments for their respective defendants (T. 71-82, 585-612). Defendant's counsel stated clearly in opening argument that she was independant of co-defendant's counsel in her representation of the defendant and stressed that the jury must view them

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[4] Defendant's appointed counsel from the Legal Defender's Office made the following motions to the court: Motion to Discover (R. 89-92); Supp. Motion to Suppress Evid. (R. 102-03); Motion in Limine re Prohibition of Prior Convictions Supp. (T. 2-7); Motion to Limit Evidence of Prior Conviction Supp. (T. 2-7); Renewed Motion to Suppress Supp. (T. 7); Motion to Suppress Evidence of Other Acts (T. 61, 323); Motion for Directed Verdict (T. 622); Motion for New Trial (T. 739-44, R. 285-88). Defense counsel also joined in the following motions made at trial by co-defendant's counsel: Motion to Dismiss (T. 425 and T. 323); Motion for Mistrial (T. 426, 540, and 623) Counsel also made rigourous objections at trial in behalf of defendant (T. 172-72, 289, 291, 305, 307, 327, 347, 421, 542-43, 551, 556, 558-59, 563-64) and gave vigorous cross-examination to the State's witneses (T. 144, 190, 218, 247, 315, 322, 328, 334, 360, 363, 368, 378, 565).

individually (T. 77-78). In closing argument, defendant's counsel again reiterated to the jury that although there is some "overlap in certain instances in terms of defending our respective defendants, the cases against them are separate and they must be looked at by you in that same type of fashion." (T. 603).

In his Motion for New Trial, defendant raised the issue of his counsel's ineffectiveness (T. 740). The court denied his motion and commented that in his opinion, defendant's attorney is one of the best criminal lawyers in the State of Utah and that defendant's claim of ineffectiveness was meritless (T. 742-43).

Under similar circumstances, the Arizona Supreme Court in State v. George, 100 Ariz. 350, 414 P.2d 730 (1966), affirmed the denial of a Motion for New Trial and held that:

> Defendant has failed to show any conflict of interest between himself and the other defendant . . . . The defendants were identified as two of the persons responsible for the crimes; were arrested together and charged with the same crimes; and part of the stolen items were found in their possession.
>
> . . .
>
> We will not disturb a trial court's denial of a motion for a new trial unless it appears there has been an abuse of discretion. . . .

George, 414 P.2d at 734 (citations omitted). See also, State v. Tippets, 584 P.2d 892 (Utah 1978).

An examination of the instant record reveals that no conflict of interest existed between the defendant and co-defendant. Humphrey was positively identified by two persons at King's Custom Jewelers as the person who held up the jewelry

store (T. 85, 142, 287-88); two other witnesses testified that both defendant and Humphrey were responsible for the aggravated robbery (T. 85, 142, 187-88); both defendant and Humphrey were arrested together and charged with the crime (T. 665-66); some of the stolen articles were found in their possession as well as a gun identified by witnesses as similar to that used in the robbery (T. 111, 155, 189, 669, 671); and both defendants took the stand and corroborated the other's testimony that they had been set up (T. 432-492, 503-538).

In a post-trial letter written to his counsel, defendant, for the first time, raises the issue of a conflict of interest between his counsel and co-defendant's counsel (R. 287-88). Defendant states in his letter:

> I have asked that you file a motion to sever defendants which you denied me, I told you that I needed to impeach John Humphrey with his prior criminal record, and to show . . . that Russell Martindale was also wanted for armed robbery in other states.

(R. 287-88). Defendant also claimed his Sixth Amendment rights had been violated because his counsel had not made a particular motion and had not called witnesses in his defense (R. 287-88).

The strategy used by defendant's counsel cannot be used to determine whether she was effective or whether the alleged conflict between defendant and co-defendant was prejudicial. In State v. Wood, 648 P.2d 71 (Utah 1981), cert. denied, 459 U.S. 988 (1981) the Utah Supreme Court held the "[t]rial tactics lie within the prerogative of counsel and may not be dictated by his client. Decisions as to what witnesses to call, what objections to make, and, by and large, what defenses to interpose are

generally left to the professional judgment of counsel." Wood, 648 P.2d at 91. As Justice Frankfurter noted in Glasser, "'[j]oint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.'" Halloway v. Arkansas, 435 U.S. 475, 482-83 (1978)), quoting, Glasser v. United States, 315 U.S. 60, 92 (1942). It is generally accepted that "[s]trategic decisions are not the kind which the courts permit convicted felons to indulge in second guessing." State v. Huizar, 112 Ariz. 489, 543 P.2d 1118, 1120 (1975).

In this instance, had defendant offered evidence of co-defendant's prior criminal record, his own defense would have been undermined since their testimony during trial was corraborative. When the "testimony of the co-defendant is corroborative or exculpatory, no conflict arises." United States v. Alvarez, 696 F.2d 1307, 1310 (11th Cir. 1983).[5]

Here, defendant has failed to show "how counsel's decisions were not merely tactical choices or how [her] performance fell below an objective standard of reasonable judgment." Julian, 771 P.2d 1061, 1064 (Utah 1989). In State v. Barella, 714 P.2d 287 (Utah 1986), the Utah Supreme court cited with approval the language in United States v. Lugo, 350 F.2d 858 (9th Cir. 1965) where the court stated:

> [W]hile we cannot indulge in nice calculations about the amount of prejudice

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[5] See also, United States v. Risi, 603 F.2d 1193, 1195 (5th Cir. 1979); People v. Dallas, 40 Ill. Dec. 110, 85 Ill.App.3d 405 N.E.2d 1202, 1214 (Ill. App. Ct. 1980).

> which results from a conflict of interest . . . neither can we create a conflict of interest out of mere conjecture as to what might have been shown."

Barella, 714 P.2d at 289, quoting, Lugo, 350 F.2d at 859.

Defendant has also failed to show how a conflict, if it existed, operated to his detriment at trial other than to speculate how independent counsel would have conducted his defense. See Br. of App. at 20-21. In the absence of a showing of prejudice, an ineffective assistance claim must fail. Geary, 707 P.2d at 646.

B. State Constitutional Analysis

Defendant argues that an accused should be granted more rights under the Utah Constitution than the federal constitution. He urges this Court to adopt a rule that an inquiry be mandated at the trial level in all cases of multiple representation by the same law association, and that remedial measures such as severance, appointment of independent counsel, or waiver be required if a potential conflict appears. (Br. of App. at 22.)

As recognized by defendant, Utah has adopted the universally accepted federal Strickland standard in reviewing claims of ineffective assistance of counsel. State v. Archuleta, 747 P.2d 1019, 1023 (Utah 1987). Further, defendant concedes the Utah and federal provisions are textually identical and that the Utah Supreme Court has expressly rejected any modification of the federal Strickland standard. State v. Verde, 770 P.2d 116, 118-19 n.2 (Utah 1989). (Br. of App. at 9-10). Defendant merely complains that the failure of the Utah courts to consider the parameters of the state guarantee "has created case law which

simply 'march[es] lock-step with interpretation given to . . . the United States Constitution.'" (Br. of App. at 10.) (Quoting State v. Bishop, 717 P.2d 261, 272 (Utah 1986) (Durham, J., concurring).

Respondent concedes that this Court may continue to follow the federal minimum guarantees or may extend further state protections. State v. Jewett, 146 Vt. 221, 500 A.2d 233 (Vt. 1985). However, contrary to defendant's assertion, this court is not faced with a "clean slate" in analyzing the State guarantee of effective assistance of counsel. (Brief of App. at 11.) As cited above, the Utah courts have adopted the federal Strickland standard without expressing whether the ruling was based on state or federal grounds. Further, the Utah Supreme Court has refused to modify the Strickland test. State v. Verde, 770 P.2d at 118-19 n.2. Accordingly, if this Court is inclined to specify separate state constitutional standards in evaluating effective assistance of counsel, respondent submits that the Strickland test has been adopted by the Utah courts as a workable standard and should be incorporated into any separate state standard.

POINT II

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION.

Defendant argues that there was insufficient evidence presented at trial to support his conviction. A review of the evidence, however, reveals that defendant's claim is without merit.

The Utah Supreme Court pointed out in State v. Booker, 709 P.2d 342 (Utah 1985), that where a defendant claims the

evidence was insufficient to sustain his conviction, the standard of review is narrow.

> [W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant commited the crime of which he was convicted." . . . In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses. . . " . . . . So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops. . . .

Id. at 345 (citations omitted).

Defendant was convicted of the offense of Aggravated Robbery which provides as follows:

> **Aggravated robbery. --**
> (1) A person commits aggravated robbery if in the course of committing robbery he:
>
> (a) Uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon; or
>
> (b) Causes serious bodily injury upon another.
>
> (2) Aggravated robbery is a felony of the first degree.
>
> (3) For the purposes of this part, an act shall be deemed to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

Utah Code Ann. § 76-6-302 (1978). Additionally, a person may be considered a party to a crime under the following circumstances:

> **Criminal responsibility for direct commission of offense or for conduct of another.--**
>
> Every person, acting with the mental state required for the commission of an offense who encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Utah Code Ann. § 76-2-202 (1978).

Thus, the elements of Aggravated Robbery applicable to this case are that a person (1) uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon (2) in an attempt to commit, during the commission of or in the immediate flight after the attempt or commission of a robbery. Further, a person is a party to a crime if he (1) acts with the mental state required for the commission of the offense, (2) directly commits the offense, or (3) solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense.

A review of the evidence set forth in footnote 6 below reveals that sworn testimony and physical evidence was offered at trial sufficient to establish each and every element of the offense for which defendant was convicted.[6] Based upon the

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[6] First, the evidence is clear that a sawed-off shotgun was used in the robbery of King's Custom Jewelry (T. 84, 121, 150). Co-defendant Humphrey was positively identified as the armed robber by both witnesses (T. 85, 142, 287-88, 190) and a shotgun identified by witnesses as similar to the one used in the robbery was recovered from the Webb/Gregersen home (T. 155, 189).

Russell Martindale testified that defendant promised to pay his rent if Russell would steal a car for him (T. 408). After making arrangements with Russell regarding how he was to steal the car and where he should take it afterwards, defendant took Russell to the place where he was to steal the car (T. 408-10). Using the pretense of taking the car for a test drive,

evidence, a jury could have reasonably concluded that the sawed-off shotgun was used in an attempt to commit, during the commission of, or in the immediate flight after the commission of the robbery at King's Custom Jewelers. The jury could have further found that defendant intentionally or knowingly solicited, requested, commanded, encouraged or intentionally aided Humphrey in the robbery and was therefore culpable as a party to the crime. Thus, the evidence was sufficient to

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[6] Cont. Russell took the car to a McDonald's parking lot and gave the keys to defendant (T. 409-10). This car was used in the robbery the next day and was found by police three weeks later abandoned in a parking lot (T. 334, 347, 381, 393). A hat and coat found inside the car matched the description of clothing items worn by the robber (T. 344-45, 376-77). Officer William Abbot testified that although no fingerprints were found on the car, it would be very unusual to find them on a vehicle that had been sitting for three weeks (T. 380-81).

Britt Martindale testified that defendant and Renee Gregersen arrived at her house about one-half hour after the robbery occurred and backed the defendant's Cadillac into her driveway (T. 225-26). Defendant then took a blanket off of Britt's waterbed and instructed her to follow him outside and hold up one end of the blanket behind the trunk of the car (T. 227-28, 273, 278). Defendant told Gregersen to hit the trunk button and when the trunk opened, Britt saw Humphrey in the trunk (T. 228, 278-79). Humphrey who was living with the Martindale's at the time, went into the bathroom and shaved off his beard (T. 229, 280, 435, 443-44). The defendant carried a canvas bag and a 12-gauge sawed-off shotgun with black tape around the handle into the Martindale home (T. 230-31). Britt identified Exhibit #1 as the shotgun she had seen defendant take into her house (T. 284).

Britt saw defendant and Gregersen sort through the jewelry taken from the bag at her kitchen table (T. 232, 236). She saw a diamond watch, diamonds folded up in a paper and different colored stones, as well as U.S. coins, currency and Canadian money (T. 232-34). Britt also noticed a Trolley Square insignia on the inside of some of the boxes (T. 272-274). Defendant asked Humphrey if Gregersen could keep the diamond watch and she put it in her purse (T. 233). Defendant commented that everything had gone well and that the police didn't show up for a while (T. 237).

Shortly after Britt's husband Russell arrived,

[6] Cont. defendant, Gregersen, and a now shaven Humphrey left with the money, jewelry and stones in a small brown paper bag (T. 236, 239, 264, 400). Defendant told Britt not to "mess with the bag" until he came back to get it (T. 239). Defendant returned a couple hours later and said he was going to put the bag in the river (T. 240). Defendant and Humphrey returned around 11:30 p.m., picked up Russell and the shotgun, and left for Las Vegas (T. 241, 405). Defendant said he knew someone in Las Vegas who would be able to get rid of the items he and Humphrey had stolen (T. 405).

Defendant drove Russell and Humphrey to Las Vegas in his Cadillac and paid for their stay at the Sahara (T. 404-05). After they arrived, defendant pawned some jewelry and later admitted being in Las Vegas selling diamonds on October 22, 1987 (T. 386, 526, 534). At one pawn shop, defendant took a ring to the window and asked Russell for his driver's license (T. 387). At trial, Russell admitted signing the pawn slip but testified he did not know what he was signing at the time (T. 387). Russell also testified that defendant and Humphrey left him alone several times for hours (T. 405).

At trial, defendant introduced as alibi evidence a receipt from the service station of Gregersen's son in Ely, Nevada (T. 517, 533). The receipt was not a credit card receipt but was a regular receipt, machine dated October 21, 1987, on which the defendant's name and license had been written (T. 507). Defendant did not recall whether he or someone from the service station filled out the receipt or whether he even signed it (T. 528).

Gregersen's phone record showed that defendant had the habit of calling home almost daily when on the road (T. 519, 521). Defendant claims he was traveling most of October for his business of buying and selling gold and silver (T. 523, 527). However, there is no indication from the phone record that he called home between October 11-30 (T. 522). Defendant claims he was not near a phone, but Britt and Russell testified he was in Salt Lake during that time and that he participated in the robbery (T. 225, 401, 526).

The police obtained arrest warrants for the defendant, Humphrey, and Gregersen (T. 334-36, 650). When the police went to the Webb/Gregersen home to make the arrests, defendant was found in one of the bedrooms with a sawed-off shotgun under the bed (T. 669, 675). Gregersen's purse was searched for weapons incident to her arrest and a diamond watch was found which she later told police came from this robbery (T. 671). Gregersen also consented to a search of her property for weapons and jewelry (T. 653, 669-70, 674). Among other items, the police took into evidene a diamond and sapphire ring (T. 655). Mr. Karmillian testified that both the diamond watch and the diamond

establish the requisite elements of the offense.[7]

POINT III

NO CUMULATIVE PROSECUTORIAL MISCONDUCT OCCURRED WHICH WOULD JUSTIFY A NEW TRIAL.

Defendant argues that the cumulative effect of allegedly improper prosecutorial remarks warrants a new trial. Defendant's claim is frivolous.

It is well-established that a defendant must show some degree of demonstrable prejudice in order to successfully argue error based on prosecutorial misconduct. State v. Lafferty, 749 P.2d 1239, 1255 (Utah 1988), On Reconsideration, 109 Utah Adv. Rep. 21 (5/30/89). The Utah Supreme Court has adopted a two-part test for determining whether a prosecutor's remark warrants reversal; "(1) did the remarks call to the attention of the jurors matters which they could not propely consider in determining their verdict, and (2) were the jurors under the circumstances of the particular case probably influenced by those

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[6] Cont. [6] Cont. and sapphire ring were among those items stolen from his store on Oct. 1987 (T. 111). Britt Martindale also testified that the watch was the same watch she had seen defendant take from the bag and her house following the robbery (T. 232).

[7] Defendant appears to further argue that the evidence was insufficient because some evidence, if believed, tends to show that defendant did not commit the offense. In making his argument, defendant ignores the fundamental principle that a jury's belief or disbelief of a defendant's theory of a crime is a matter within the jury's exclusive prerogative to weigh the credibility of the witness' testimony. State v. Lamm, 606 P.2d 229 (Utah 1980); Efco Distributing, Inc., v. Perrin, 17 Utah 2d 375, 412 P.2d 615 (Utah 1966). The basic function of the jury is to weigh the conflicting evidence and draw conclusions therefrom. State v. Pierce, 722 P.2d 780 (Utah 1986). Despite testimony to the contrary, the jury could have found, beyond a reasonable doubt, that defendant committed the offenses of which he was convicted. State v. Petree, 659 P.2d 443 (Utah 1983).

remarks." State v. Tucker, 727 P.2d 185, 187 (Utah 1986). Under Rule 30 of the Utah Rules of Criminal Procedures, "[a]ny error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded." This Court should not reverse a conviction unless the error "is something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result." State v. Tucker, 709 P.2d 313, 316 (Utah 1985), quoting State v. Urias, 609 P.2d 1326, 1329 (Utah 1980).

Further, the Utah Supreme Court has recognized that "'[c]ounsel for both sides have considerable latitude in their [closing] arguments to the jury; they have a right to discuss fully from their stand points the evidence and the inferences and deductions arising therefrom.'" State v. Lafferty, 749 P.2d at 1255, quoting State v. Valdez, 30 Utah 2d 54, 60, 513 P.2d 422, 426 (1973). Any improper comment may be effectively cured by the trial court's admonishment to the jury to disregard the improper statement. See State v. Hales, 652 P.2d 1290, 1292 (Utah 1982); State v. Tillman, 750 P.2d 546, 555 (Utah 1987). Additionally, a curative jury instruction is generally sufficient to obviate any harm from an improper comment by the prosecutor. State v. Hales, 652 P.2d 1290, 1292 (Utah 1982); State v. Bales, 675 P.2d 573, (Utah 1983).

The concept of "'[c]umulative error refers to a number of errors which prejudice [a] defendant's rights to a fair trial.'" Bundy v. DeLand, 763 P.2d 803, 806 (Utah 1988) (quoting State v. Ellis, 748 P.2d 188 (Utah 1987); State v. Rammel, 721

P.2d 498, 501-02 (Utah 1986)). Where no substantial errors were committed, the concept of cummulative error does not apply. Bundy v. DeLand, 763 P.2d at 806; State v. Eldredge, 773 P.2d 29, 38 (Utah 1989).

Turning to defendant's allegations of independent error, it becomes clear that no substantial error occured. Defendant first claims that the prosecutor repeatedly disregarded the pretrial agreement and order prohibiting references to other bad acts of defendant (R. 105-06, T. 61-62). Specifically, defendant complains that the prosecutor elicited testimony regarding a police stop for a minor traffic violation in Oregon. (Br. of App. at 28). During the prosecutions cross-examination of co-defendant Humphrey, the following dialogue occured:

> Q: Then you are in Portland for a while and then you went down to Salt Lake again?
> A: Right. We came to Salt Lake on the 1st.
> Q: Did either you or Mr. Webb pawn any property while you were in Portland?
> A: No, not that I know of.
> Q: Isn't it true that you were seen at a pawn shop in Portland on the 29th day of October, and that you were asked some questions?
> MS. WELLS: Objection, Your honor. I don't know what counsel is going to but the court has made certain pre-trial orders. I don't know what the relevance of this is concerning the testimony that Mr. Humphrey has previously given. We just don't know what it is intended to elicit. If Mr. Cope wants to make a proffer, he should do it out of the presence of the jury.
> MR. COPE: If we could approach the bench, I will do that. I will only take a couple seconds.
>
> (Off the record discussion at the bench.)

(T. 488-90). After the bench conference, no further inquiry was made by the prosecutor, no ruling was made by the trial court regarding the objection, and no further objections were made by defense counsel. Thus, it must be assumed that defense counsel's concerns were alleviated regarding the direction of the cross-examination.

Later, while cross-examining defendant, the following discussion occurred:

> Q: As a matter of fact, you were in Portland on the 29th pawning some things, weren't you?
> A: No, sir. I never did pawn anything. I sold some things in Oregon, Yes, Sir, I don't deny this. I did not hock nothing, Sir.
> Q: So you sold some things?
> A: Yes, Sir, I did.
> Q: Did you buy--I don't want to quibble. did you sell them at a pawn shop?
> A: He is a used dealer, Yes, Sir. He buys.
> Q: Those things that you sold were stolen, weren't they?
> A: Not that I know of, Sir, and anything that was sold up there was not out of a robberty here either, sir.
> Q: Do you remember who you sold it to?
> A: Yes, I do.
> Q: Are you familiar with what that person told the police regarding the conversation he had with you when you when you [sic] sold the things?
> MS. WELLS: Objection.
> THE WITNESS: I have a copy, Sir, of that, if you would like it out in the court. That's up to you.
> MS. WELLS: I Object. It is clearly a hearsay document.
> THE COURT: Sustained.
> MR. COPE: I am sorry, I didn't understand the nature of the objection.
> THE COURT: Hearsay.
> MR. COPE: I merely asked whether he knew about it or not. I don't care--I am not going to get into the document. I want to know whether he knew about it or not. He said he did. May the answer stand?

THE COURT: It may.

(T. 523-54.) Defendant objected on the basis of hearsay, the objection was sustained, and no hearsay was elicited. Id. To preserve an objection on the admissibility of evidence, a timely and specific objection must appear in the record. Utah R. Evid. 103(a)(1); State v. McCardell, 652 P.2d 942 (Utah 1982) (applying contemporaneous objection rule, Utah R. Evid. 103(a)(1)). While defendant made a timely objection, the specific ground stated for the objection is substantially different than his claim on appeal. Accordingly, this Court should not consider defendant's claim where it is raised for the first time on appeal. State v. Steggell, 660 P.2d 252 (Utah 1983).

Defendant further complains that the prosecutor attempted to portray defendant generally as a criminal. He points to the prosecutor's direct examination of Detective Lomax which occurred as follows:

> Q: You made marks on the one figure that's labeled "bed". That's where you say you found the shotgun?
> A: Partially protruding.
> Q: And the other mark appears on the item that is labeled--
> A: Dresser. As I Recall, it was in a jewelry case there.
> Q: Okay, thank you. You may return to your seat. Did you receive any instructions about what you were looking for with regards to the jewlery box?
> A: Well, obviously, we were looking for the shotgun. I received a phone call from Detective Dalling indicating that there were a couple of rings in the jewelry box that he had been told by Reneee that were given to her by either Webb or Humphrey.
> MS. WELLS: Objection.
> MR. COPE: Not offered to prove the matter asserted, merely to show why he was looking in the jewelry box.

defendant's plan to commit the charged robbery. The witness's response was that the day before the charged robbery, defendant was heard to say that he was going to do something at the Cottonwood Mall or at the Best store (T. 291). The question and response were confined to the planning of the charged robbery and were not an attempt to elicit evidence of other crimes. Therefore, Judge Sawaya did not abuse his discretion in denying defendant's Motion for New Trial on the grounds asserted below (T. 324).

Defendant claims that the prosecutor improperly elicited testimony that defendant used an alias. In examining Detective Dalling, the following dialogue transpired:

> Q: Are the people you were looking for anywhere in the courtroom?
> A: Yes, two of them are.
> Q: Would you please indicate who they are?
> A: The gentleman in the red shirt seated at the end of the table and the gentleman in the white shirt seated between the two ladies.
> Q: Do you know the names?
> A: Yes. The gentleman in the red shirt is named Charles Webb, also known as Charles W. Dawn--
> MS. WELLS: Objection.
> THE COURT: Just a moment. Sustain the objection, strike the last part of that answer.

(T. 327.) The record shows that defendant's objection was sustained and the last part of the answer stricken sua sponte. Id. Later, the issue was discussed outside the presence of the jury:

> MR. COPE: One matter for the sake of the record if it goes up on appeal. For some reason, there was an indication from one of the witnesses that Mr. Webb had a name

also known as Dawn or something to that effect. Your honor, I would like the court to note its own record to the effect that Mr. Webb indicated that that was his name when he was arraigned before this Court and I don't know whether any curative instruction needs to be given regarding that.

THE COURT: I didn't feel that it was prejudicial, what was said, do you have an alias--that may be borderline prejudicial but I don't think it requires a curative instruction. So for the record, I will deny any reuqest.

MS. WELLS: That's why I stopped. I didn't offer any objection. I felt that it was just necessary to preserve rather than to call attention to it.

THE COURT: I suppose there's a--society has an opinion or feeling about people who use aliases but no also known as, so--I don't think any harm was done.

(T. 428-29.) Noticeably, defense counsel did not argue the matter, move for a mistrial, or request a curative jury instruction. Id. The court noted that the witness did not say that defendant used an alias, but that he was "also known as" Charles W. Dawn. Judge Sawaya found that no "harm was done" (T. 429). Consequently, this court should find that no error occurred and no prejudice resulted.

Defendant claims that the prosecutor intentionally elicited tesitmony from co-defendant Humphrey that both he and defendant were in jail. The context of the testimony was as follows:

Q: You have had an opportunity to discuss this story with Mr. Webb at some considerable length, haven't you?

A: They got Webb on the second tier and I am--

THE COURT: In any event, I think it is prejudicial and should be stricken. I will admonish the jury to discard that answer.

(T. 304-05.) While defendant did not state a specific ground for his objection, it appears that he was complaining of the hearsay statements to police by Renee Gregersen that jewelery given to her by defendant or Humphrey could be found in her jewelry box. Id. Defendant's objection was sustained and the jury admonished to disregard the response. Id. Judge Sawaya later denied defendant's Motion for New Trial finding that the comment was "not that prejudicial" and that it did not warrant a curative instruction. In view of the minimal prejudice that could be inferred from the comment and the judge's quick response in admonishing the jury to disregard the comment, no substantial error occurred.

Defendant complains that the prosecutor elicited testimony from Britt Martindale that defendant and Humphrey had contemplated other robberies at other locations and that defendant was not a legitimate jewelry trader because he sold expensive jewlery at cheap prices. The following testimony occurred:

You knew something was going on. What exactly did you know about what was going on regarding the robbery of a Trollley Square jewelry store on the 21st day of October, prior to those people arriving at your house?
A: I just knew there was something that was going to go on. I didn't know it was an armed robbery, and it was said that they were going to do--
MS. WELLS: Objection, foundation.
THE COURT: Sustained.
Q: (by Mr. Cope) You can't say "it was said". You have to say who said it and when.

A: Chuck said.
Q: When?
A: That day before.
Q: And where?
A: At his apartment.
Q: And who was there when he said it?
A: Humphrey and Renee and Russell and her kids and my kids.
Q: Now, what did he say?
A: He said that they were going to do something at Cottonwood Mall or Best which used to be Labelle's.
MS. WELLS: We would enter an objection at this time and ask to have leave of the record, perhaps outside the hearing of the jury.
MR. COPE: You indicated--
THE COURT: Hold on. I would overrule the objection and you may have the benefit of the record at the next break.
MS. WELLS: Thank you.

. . .

Q: (by Mr. Cope) You indicated in your cross-exaination that you understood Mr. Webb's occupation to be buying and selling jewlery. When was it that you understood that to be the case? What period of time did you believe that to be the case?
A: I was just told. I didn't really fully believe it.
Q: Is there any reason why you did not elieve that?
A: Yes.
Q: What?
A: He would sell rings, diamond rings, and that looked to me to be inexpensive for $125.

(T. 291-92.) Defendant moved for a mistrial claiming that the witness' response implied that defendant had planned other robberies (T. 323). The motion did not include a claim that the witness improperly expressed doubt about the legitimacy of defendant's occupation as a jewelry trader (T. 323). Neither did defendant object to such testimony (T. 292). The record is clear that the prosecutor was attempting to elicit testimony of

Q: Well, I think you can answer the question yes or no.
A: Okay.
Q: No?
A: What.
Q: The answer is no?
A: The answer is no, right.
Q: Have you had any opportunity to discuss this story

(T. 491.) No objection was made by defendant. Id. Later, defendant moved for a mistrial arguing that Mr. Humphrey's reference to defendant being on another tier implied that defendant was in jail (T. 540). The prosecutor responded that his question required only a yes or no answer and that Humphrey volunteered the information complained of. Id. Judge Sawaya denied the motion. Id.

It is readily apparent that the question merely asked if defendant and Humphrey had the opportunity to discuss their story (T. 491). The question required only a yes or no answer and did not request the location of any discussions. No objection was timely made and no curative instruction requested. Thus, defendant failed to preserve the issue, no error occurred, and no prejudice resulted.

Defendant argues that the prosecutor attempted to portray defendant as a bad person and a criminal. In cross-examining Ronda Blanchard who was a defense witness called to impeach Britt Martindale's reputation for veracity, the prosecutor asked:

Q: Isn't it true that she told you that Mr. Humphrey and Mr. Webb were bad people and that they were stealing things?
MS. WELLS: Objection, Your honor.
THE COURT: Sustained.

Q: (by Mr. Cope) Well, did you believe her about some things and not about others?
A: No, I don't hardly believe anything she said.

(T. 502.) As show, the objection was sustained and no further inquiry made.

Later, the prosecutor recalled Detective Dalling to impeach defendant by examining defendant's reputation for truthfulness and veracity:

Q: (by Mr. Cope) Did you receive any information from Mr. Webb?
A: Yes.
Q: Did you attempt to verify that information?
A: Yes, Sir.
MS. WELLS: Calls for hearsay and goes directly to information that would be potentially protected. We don't know what it is and it is improper to bring it up at this time. We don't know what he is attempting to elicit from Detective Dalling, and in the vague manner in which it is presented, I am required, in cross-examination, to either ask for specifics which might then cross some constitutional line or to leave it vague and unrebutted, that's contrary to the court's pretrial relief and recognized principles.
THE COURT: What evidence are you attempting to rebut by this line of questioning?
MR. COPE: Your honor, the defendants took the stand and became witnessess by so doing, I believe we are allowed, at this point, to indicate by opinion or reputation, that the truthfulness and veracity is poor or bad. That's all I am trying to do.
THE COURT: Sustain the objection.

(T. 552-53.) Defendant's hearsay objection was sustained and the inquiry terminated. Id. Further, defendant did not object to

the prosecutor's comments in response to the objection and it is now raised for the first time on appeal. Defendant cannot now claim error on appeal where he failed to raise the issue below to allow the trial court an opportunity to cure the alleged error. Steggell, 660 P.2d at 254.

Defendant alleges further prosecutorial misconduct arising from testimony regarding hair samples found on a coat and hat discovered in the robbery vehicle. Co-defendant Humphrey called as a witness Martha Kerr of the Utah State Crime Laboratory (T. 369). Kerr testified that she found hair samples on the coat found in the robbery vehicle (T. 372). Humphrey's counsel asked the witness whether she had ever been given any known hair samples to compare with the unknown hair samples found on the coat (T. 372). The witness responded, "no." Id. On cross-examination, the prosecutor asked the witness whether anyone "from the defense ever submitted any samples to [her] to compare it with [her] sample?" (T. 373.) The witness again responded, "no." Id. No objection was made to the question or response. Id. Sometime later, defendant moved for a mistrial on the grounds that the prosecutor's question was an improper comment on defendant's right to remain silent (T. 426). Judge Sawaya summarily denied defendant's motion.

This Court should reject defendant's claim for several reasons. First, defendant failed to make a timely objection to the question as required by Utah R. Evid. 103(a)(1). Second, Humphrey's counsel opened up the inquiry by eliciting testimony that no comparison of hair samples had been conducted. Third,

the question was not a comment on defendant's right to remain silent since hair samples may be taken by the prosecution without a violation of a defendant's right against compulsory self-incrimination. State v. Ruebke, 240 Kan. 493, 731 P.2d 842, 860 (1987), cert. denied, 483 U.S. 1024 (1987). Lastly, no perceivable prejudice could have resulted from the prosecution pointing out that neither the prosecution or defense attempted to obtain a comparison of hair samples.

Defendant claims that the prosecutor improperly inferred in closing argument that co-defendant Humphrey refused to be in a line-up. In response to Humphrey's counsel's comment in closing argument that no line-up was conducted, the prosecutor commented as follows:

> Have a good look at that composite sketch that was introduced by the defense and compare it with the 1986 photograph authenticated by Mr. Humphrey himself about what he looked like with a beard on, an incredibly good likeness, I would say. No line-up. There was no line-up. Oh, my goodness, we can't have a line-up if the defendant doesn't want to participate in one. And if we have one or if we showed some pictures, then the defense is going to say we suggested to these people what they were supposed to say, so we are in no position-- Yes, there was no line-up, but why do we need a line-up when you have the people, when you have the eyewitnesses saying yes, that's who it was, when you have a third party saying these people participated in a robbery that my husband helped to stage.

(T. 615.) Later, Humphrey's counsel, joined by defendant's counsel, moved for a mistrial arguing that the prosecutor's comment implied that Humphrey refused to participate in a line-up and thus violated Humphrey's right to remain silent (T. 623).

The prosecutor responded that the issue was fairly raised in Humphrey's closing argument where he complained that no line-up was conducted. Id. He explained that he was merely pointing out that the State would be criticized if it conducted a line-up and criticized if it did not. Id. Judge Sawaya denied the motion. Defendant's claim should be rejected where the comment was fairly in response to Humphrey's closing arument, was a fair comment on the evidence, and caused no perceivable prejudice to defendant since it merely dealt with co-defendant Humphrey.

Finally, defendant claims that the prosecutor inappropriately characterized Russell Martindale as a "circumspect" defense witness due to his grant of immunity. The prosecutor commented as follows:

> It is significant that the defense called Mr. Martindale at the preliminary hearing, and he refused to testify. Mr. Martindale, apparently, has always been a defense witness but as his demeanor on the stand shows, I would indicate he was very reluctant. Why is he reluctant? Well, certainly not from the questions asked. He is scared. He knows that if he gets asked certain questions now that he has a grant of immunity. He has to answer them. He is worried what kinds of questions may be asked. Maybe the grant of immunity doesn't extend as we read it to him. He acknowledged the grant of immunity doesn't extend beyong that small time frame and it doesn't extent beyond the borders of the State of Utah. That's why he is being so circumspect, but he did answer all the questions he was asked and all the questions that he was asked which were quite obviously attempts to get him to say he might have said something different on the 11th then he did on the 13th. All the questions that he was asked implicate Mr. Humphrey and Mr. Webb, all of the, and himself, too, and himself. So where was his advantage to getting a grant of immunity? Where was defense's advantage of calling Mr. Martindale as a defense witness?

> Yes, it is true the grant of immunity was procured by the county attorney. Mr. Yocum is the only person in the county who can give such a grant. Why? Because he was subpoenaed by the defense and there's no point in having him take the stand and claim his fifth amendment privileges. Again, if he has something to say let's hear it. So he answered the questions, might not have been a very good witness, but what he had to say was true.

(T. 572-73.) The prosecutor's comment was fairly based upon the fact that Martindale was called by the defense and was only granted limited immunity to avoid the invocation of his fifth amendment priviledge against self-incrimination. The comment was not misleading or inaccurate. Nor was it harmful to defendant's case in light of the fact that the prosecutor commented that what Martindale had to say was true. Further, defendant did not raise this issue below and should be precluded from raising it for the first time on appeal.

It must be noted that the trial judge submitted several instructions to the jury which would have a curative effect on the claimed errors of defendant. The trial court instructed the jury not to consider evidence offered but not admitted, evidence stricken by the court, or any question to which an objection was sustained (T. 233; Jury Instruction No. 6). The jury was also instructed to not conjecture as to what an answer might have been or the reason for an objection. Id. The jury was told to "not consider as evidence any statment of cousnel made during trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts" (R. 235; Jury Instruction No. 8). (See also Jury Instruction No. 12; R. 239.)

As noted earlier, a curative jury instruction is generally sufficient to obviate any harm from an improper comment by a witness or counsel. State v. Hales, 652 P.2d 1290, 1292 (Utah 1982). In the absence of evidence to the contrary, this Court "must assume that the jurors were conscientious in performing to their duty, and that they followed the instructions of the court." State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322, 1324 (1974); State v. White, 577 P.2d 552, 555 (Utah 1978).

In sum, defendant claims that he is entitled to a reversal on the basis of cumulative error arising from independent instances of prosecutorial misconduct. Based on the foregoing discussion of defendant's allegations of error, reversal of his conviction is not warranted on the basis of any individual error or on a theory of cumulative error. Contrary to defendant's claim, the evidence of defendant's guilt was strong and was based on evidence of his direct involvement in the planning and execution of the robbery and flight from the robbery. Because no substantial errors occurred, the concept of cumulative error is inapplicable. State v. Eldredge, 773 P.2d 29, 38 (Utah 1989).

POINT IV

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

A. The police entry into the residence was lawful.

Defendant claims that the shotgun, watch, and ring were unlawfully seized due to an illegal police entry into his home to effect his arrest. He argues that he is entitled to a new trial

excluding the seized evidence.[8]

Defendant's claim is based upon Utah statutory provisions which specify the procedures a peace officer must follow in making an arrest. Utah Code Ann. § 77-7-6 (1978) requires that peace officer inform an arrestee as follows:

> **77-7-6. Manner of making arrest.** The person making the arrest shall inform the person being arrested of his intention, cause and authority to arrest him. Such notice shall not be required when:
> (1) There is reason to believe the notice will endanger the life or safety of the officer or another person or will likely enable the party being arrested to escape;
> (2) The person being arrested is actually engaged in the commission of, or an attempt to commit, an offense; or
> (3) The person being arrested is pursued immediately after the commission of an offense or an escape.

Id. In effecting an arrest, a peace officer may break doors and windows after making a demand for admission and explanation as follows:

> **77-7-8. Doors and windows may be broken, when.** To make an arrest, a private person, if the offense is a felony, and in all cases, a peace officer, may break the door or window of the building in which the person to be arrested is, or in which there are reasonable grounds for believing him to be. Before making the break, the person shall demand admission and explain the purpose for which admission is desired. Demand and explanation need not be given before breaking under the exceptions in section 77-7-6 or where there is reason to believe evidence will be secreted or destroyed.

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[8] Because defendant has chosen not to argue separate federal and state constitutional grounds, respondent does not engage in separate state constitutional analysis. (See Br. of App. at p.36, n.4.)

Utah Code Ann. § 77-7-8 (1978). Finally, a peace officer may seize any weapons from an arrestee as follows:

> **77-7-9. Weapons may be taken from prisoner.** Any person making an arrest may seize from the person arrested all weapons which he may have on or about his person.

Utah Code Ann. § 77-7-9 (1978).

While there is no Utah case law on the issue, other states have required a defendant to establish a prima facie case of non-compliance with a "knock and announce statute" before the burden shifts to the State to demonstrate actual compliance or exigent circumstances (See Br. of App. at page 34).

In the present case, there are three grounds upon which the police entry can be validated. First, the police did not break a door or window to gain entrance. Contrary to defendant's factual assertion, the record shows that the police knocked on the door of the residence and the door was opened by the Gregersen's teenage boy (T. 655, 672). The police then identified themselves and entered the residence (T. 665, 672). Because the police did not break or open the door, the statutory requirements for breaking a door to effect an arrest were not applicable. Thus, the police entry was proper and the evidence seized incident to the arrest was properly admitted.

Second, even if the statutory procedures were applicable, the police substantially complied. As set forth above, the police must demand entry and explain the purpose for the entry prior to breaking a door or window. Utah Code Ann. § 77-7-6 (1978). In fact, the police did request entry by the traditional method of knocking on the door and when the door was

opened, they identified themselves as police officers (T. 665, 672). Accordingly, the police substantially complied with the demand and notice requirement before a forced entry.

Finally, exigent circumstances existed to create an exception to the statutory demand and notice requirements. An exception applies when "[t]here is reason to believe the notice will endanger the life or safety of the officer or another person or will likely enable the party being arrested to escape." Utah Code Ann. §§ 77-7-6 and 8 (1978). In the present case, the police officers had arrest warrants for defendant and others who were involved in the armed robbery of a jewelry store (T. 330-36). The police knew that a sawed-off shotgun had been used in the robbery and that the robber had told the victims not to follow him because an accomplice was outside with a gun (T. 84, 103, 121, 150). In fact, the police had reason to believe that defendant was armed and dangerous and still in possession of the shotgun used in the robbery (T. 650-1). Based upon this information, the police could reasonably believe that an armed confrontation was likely and that announcing their presence and entry would increase the already present danger. Thus, an exception to the demand and notice requirement was justified.

For any of these three reasons, the police entry into the residence was lawful in order to effect the arrrest of defendant and the other robbery suspects. The entry and arrest being lawful, no state or federal constitutional violation occurred which would require suppression of the evidence seized incident to arrest. Thus, the trial court did not commit

prejudicial error in admitting into evidence the shotgun, watch, and ring which were seized incident to the arrest of the occupants of the residence.

B. The shotgun, watch and ring were lawfully seized.

1. Protective Sweep.

Defendant further complains that even if the police entry into the residence was lawful, the shotgun, watch, and ring were illegally seized. Defendant's claim is without merit.

Upon entry into the residence, the police conducted a protective sweep of the premises for persons or weapons (T. 660, 665, 669, 675). In the course of the sweep, a sawed-off shotgun was observed under the bed where defendant was laying (T. 669). The shotgun was wrapped in a towel and partially protruding out from underneath the bed (T. 303). The shotgun fit the description of the weapon used in the robbery and was seized as evidence (R. 662, 669).

The Utah Supreme Court in State v. Kelly, 718 P.2d 385, 391 (Utah 1986) recognized that clearly incriminating evidence observed in plain view during a protective sweep may be seized by police. See also United States v. Chavez, 812 F.2d 1295 (10th Cir. 1987). To establish a justifiable "plain view" seizure, three requirements must be met: "(1) lawful presence of the officer; (2) evidence in plain view; and (3) evidence which is clearly incriminating." Kelly at 389, citing State v. Romero, 660 P.2d 715, 718 (Utah 1983); See also State v. Holmes, 107 Utah Adv. Rep. 74, 76 (Utah App. 5/3/89). To be "clearly incriminating," all that is required is that there be "probable

cause to associate the property with criminal activity." Holmes, 107 Utah Adv. Rep. at 76 (quoting State v. Kelly, 718 P.2d at 390 (quoting Payton v. New York, 445 U.S. 573, 587 (1980)).

In the present case, the police were lawfully present pursuant to the warrant of arrest and were conducting a justifiable protective sweep of the premises. The area underneath defendant's bed was within the scope of the places which could contain persons or weapons which would present a danger to the officers. The shotgun wrapped in a towel was observed in plain view protruding from underneath the bed upon which defendant was laying (T. 303, 669). In light of the fact that the police had reason to believe that defendant was still in possession of the shotgun used in the robbery, the police had probable cause to believe that the shotgun observed underneath defendant's bed was associated with the robbery (T. 650-1). Thus, the shotgun was properly seized in plain view during the protective sweep of the premises.

2. Standing.

Defendant also complains that the watch and ring were illegally seized. He claims that Gregersen's consent to search the residence was given involuntarily, and that in any event, the watch and ring were seized prior to the consent search. Defendant's claim must fail for lack of standing.

The record is undisputed that the ring was found in Gregersen's jewelry box and the watch was found in Gregersen's purse (R. 302-4, 671, 705). As a general rule, fourth amendment protections against unlawful searches and seizures are personal

and cannot be asserted vicariously. LaFave, Search and Seizure, § 11.3 at p. 280 (1987). To have standing to challenge a search, a defendant must establish that he had a legitimate expectation of privacy in the invaded place. State v. Grueber, 110 Utah Adv. Rep. 29, 31 (Ct. App. 6/2/89), citing, Rakas v. Illinois, 439 U.S. 128, 143 (1978). See also State v. Constantino, 732 P.2d 125, 126-27 (Utah 1987).

In Rawlings v. Kentucky, 448 U.S. 98, 106 (1980) the United States Supreme Court held that a defendant did not have a legitimate expectation of privacy in the purse of another. In Rawlings, the defendant had placed thousands of dollars worth of illegal drugs into the purse of an acquaintance. Id. at 105. When the police arrived at the residence to execute an arrest warrant for a resident, the defendant and the purse owner were detained and searched. Id. at 101. The drugs were discovered in the purse and the defendant immediately claimed ownership of the drugs. Id. The high court held that despite the defendant's claimed ownership in the drugs, he lacked a legitimate expectation of privacy in the purse and that it was equivalent to the officer's observing the drugs in plain view. Id. at 106.

In United States v. Garcia-Rosa, 876 F.2d 209 (1st Cir. 1989), the First Circuit Court of Appeals held that a defendant did not have standing to vicariously assert the Fourth Amendment rights of his spouse. The court found that the defendant/homeowner did not have the rights of his wife to object to a warrantless search of a box seized from a dresser in his wife's bedroom.

In the present case, defendant was apparently a co-occupant of the premises with Gregersen. The record shows that Gregersen's purse was searched for weapons at the time of her arrest (T. 671). No weapons were found and the watch was not seized. Id. Gregersen requested that her purse be taken with her to the police station (T. 671, 675). At the police station, Gregersen stated that the watch came from the robbery and the watch was then seized (T. 671, 676).

There is no record evidence that Gregersen's purse was seized from an area of the premises in which defendant had a legitimate expectation of privacy. Further, there is no evidence that defendant had a privacy interest against governmental intrusion into Gregersen's purse. Finally, the evidence shows that the watch was not seized by the police until Gregersen admitted at the police station that the watch came from the robbery. Accordingly, defendant has no standing to challenge the seizure of the watch.

Likewise, defendant has no standing to challenge the seizure of the ring from Gregersen's jewery box. While the record is unclear regarding when the watch was seized, the record does establish that the police had information that stolen jewelry was contained in the jewelry box, that the police were lawfully present while conducting a protective sweep of the premises, that the police seized the ring from the jewelry box, and that the jewelry box was Gregersen's (T. 304-05, 660, 665, 669, 675). There is no record evidence that defendant had a legitimate expectation of privacy in the area searched or the

item seized. Thus, defendant has no standing to challenge the seizure of the ring.

3. Consent Search.

In any event, the ring was seized pursuant to a voluntary consent search of the residence. In determining whether an accused's consent to search was given voluntarily, this Court adheres to the "totality of circumstances" standard as set forth in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). State v. Arroyo, 770 P.2d 153, 155 (Utah App. 1989). The State bears the burden of proving that consent was voluntarily given. State v. Sierra, 754 P.2d 972, 981 (Utah App. 1988).

In Schneckloth, the United States Supreme Court recognized that voluntary consent to search is an exception to the general search warrant and probable cause requirements. Id. at 222. Some of the factors against voluntariness may be the accused's youth, lack of education, low intelligence, or the lack of any advice to the accused of his constitutional rights, the length of detention, repeated questioning, or the use of threats, duress, promises or other coercion. Id. at 226.

Defendant argues that even if Gregersen gave consent, it was given involuntarily as a result of duress or coercion. In State v. Whittenback, 621 P.2d 103 (Utah 1980), the Utah Supreme Court set forth five factors which may show a lack of duress or coercion:

> (1) the absence of a claim of authority to search by the officers; (2) the absence of an exhibition of force by the officers; (3) a mere request to search; (4) cooperation by the owner of vehicle; and (5) the absence of deception or trick on the part of the officer. . . .

Id. at 106. In reviewing a trial court's finding that consent was voluntary, this Court will not set aside the finding unless it is against the clear weight of the evidence, or if this Court otherwise reaches a definite and firm conviction that a mistake has been made. State v. Walker, 743 P.2d 191, 192-93 (Utah 1987); State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987); Utah R. Civ. P. 52(a).

Applying the voluntariness test to the present facts, the record clearly indicates that Gregersen voluntarily consented to the search of the residence. Upon arrival, the police officers arrested and handcuffed Ms. Gregersen based upon the warrant for her arrest (T. 666, 673). Because of her concern for her infant son who was crying on and off, the infant was placed in a playpen next to her (T. 659, 673). Once the premises were secured, Gregersen was uncuffed and allowed to sit at the kitchen table, smoke a cigarette, and drink coffee (T. 694-95, 702). The officer asked her if she was paying rent on the residence and whether she would consent to a search for weapons and jewelry (T. 669, 674). He explained that she did not have to consent to the search and that if she did not, no search would be conducted (T. 653, 661, 670, 672). A permission to search form was filled out and presented to Gregersen. (See Addendum "B"; Permission to Search Form). Gregersen signed the form which was also witnessed and signed by two police officers. Id. (T. 653, 670.)

At the suppression hearing, Gregersen testified that she simply could not remember signing the consent form (T. 697, 704). However, she admitted that the signature on the form

looked like hers (T. 704). No testimony was offered that her consent was involuntary. Based upon the testimony and evidence at the suppression hearing, Judge Sawaya denied defendant's Motion to Suppress (R. 68).

At a re-newed suppression hearing, Gregersen denied that the signature on the form was hers. (Transcript dated May 20, 1988 at p. 41.) Again, she simply denied any memory of the form. Id. at 39. Judge Sawaya again denied defendant's motion (R. 119).

Under the totality of the record evidence, it cannot be said that Judge Sawaya's finding of voluntary consent is against the clear weight of evidence. Gregersen was in custody, but sitting at her kitchen table drinking coffee and smoking a cigarette. She was informed of her rights and that the police would not search unless she consented. She was aware that the police did not have a search warrant and that she could refuse consent. No promises or threats were made to induce her cooperation. Finally, she signed a consent form which states that her consent was voluntarily given. Under these circumstances, this Court should find that Judge Sawaya did not abuse his discretion in finding her consent to be voluntarily given. Accordingly, the ring obtained from her jewlery box was legally seized pursuant to a consent search.

POINT V

THE TRIAL COURT PROPERLY SENTENCED DEFENDANT TO A CONSECUTIVE TERM OF FIVE YEARS FOR USE OF A FIREARM.

A. The Firearm Enhancement Statute May Be Applied To A Conviction For Aggravated Robbery By Use Of A Firearm.

Defendant argues that because his conviction of Aggravated Robbery necessarily included the use of a firearm increasing his punishment from a second to a first degree felony, the trial court improperly imposed a firearm enhancement penalty which applies generally to all first degree felonies. Defendant's argument must fail.

Defendant was sentenced by Judge Sawaya to serve a term in the Utah State Prison of five years to life with the addition of a mandatory one year for use of a firearm and a discretionary five years for use of a firearm, each to run consecutively to the sentence of five years to life (R. 282). The firearm enhancement penalties were imposed pursuant to Utah Code Ann. § 76-3-203(1)(Supp. 1988) which states:

> A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:
>
> (1) In the case of a felony of the first degree, for a term at not less than five years, . . . and which may be for life but if the trier of fact finds a firearm . . . was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently . . . .

(Emphasis added.) Because Aggravated Robbery is a first degree felony, defendant was sentenced to an indeterminate term of five years to life. Id. The finder of fact also found that a firearm

was used in the commission or furtherance of the first degree felony. Accordingly the statute mandates, the imposition of an enhancement term of at least one year, but which may be five years, to be served consecutively.

The purpose behind firearm enhancement penalties was explained by the Utah Supreme Court in State v. Angus, 581 P.2d 992 (Utah 1978). The Supreme Court rejected the defendant's argument that the enhancement provision created a separate offense which should be separately charged. The Court explained that the legislature has the authority to increase the degree of crime where "instruments of violence" were used in its commission. Id. at 994. The legislature also has the authority to determine that some deadly weapons were more dangerous than others and their use was "more deserving of punishment." Id. at 995. Thus, firearm enhancement penalties are a valid exercise of legislative authority.

In State v. O'Brien, 721 P.2d 896 (Utah 1986), the Utah Supreme Court addressed the issue of firearms enhancement in a multiple count conviction. The defendant in O'Brien appealed his conviction for Aggravated Robbery, Aggravated Burglary, Aggravated Kidnapping, and Theft of Firearms. The trial court had erroneously imposed two consecutive enhancements for the use of a firearm for each conviction. The trial court was directed to reduce the enhancement sentence to one enhancement for each conviction, including the Aggravated Robbery conviction. In doing so, the Utah Supreme Court affirmed the use of a firearm enhancement penalty attached to an Aggravated Robbery conviction.

Defendant speculates that the legislature did not intend the enhancement statute to apply to the offense of Aggravated Robbery.[9] However, the legislature in the 1989 general session deleted the term "firearm" from the Aggravated Robbery statute and substituted the language, "uses or threatens to use a dangerous weapon as defined in Section 76-1-601" (emphasis added). Notably, other aggravated crimes include the use of a "dangerous weapon" as an element of the offense.[10] The recent amendment of the Aggravated Robbery statute evidences the legislature's intent to apply the firearm enhancement statute to aggravated crimes uniformly.

Defendant further argues that in a similar case, the United States Supreme court rejected the imposition of the general federal firearm enhancement statute to the federal Bank Robbery statute. Simpson v. United States, 435 U.S. 6 (1978). (Br. of App. at 45.) However, the Simpson case is

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[9] In reviewing the legislative history surrounding Aggravated Robbery and firearm enhancement statutes, the legislative record reveals little about the legislature's intent in adding the word "firearm" to the Aggravated Robbery statute or whether the legislature intended to leave Aggravated Robbery out of the reach of the enhancement statute. The record does show that public concern over the increased use of firearms in the commission of crimes prompted the Utah legislature to enact the enhancement statute to deter their use. See House debate on Utah Code Ann. § 76-6-302--Aggravated Robbery statute, originally S.B. 159, passed by House of Representatives March 13, 1975, disc. #405; and House debate on Utah Code Ann. § 76-3-203--Enhanced Penalty Statute, originally H.B. 323, passed by House of Representatives Feb. 28, 1977, disc. #181-82. No legislative record could be found of Senate debate on either bill.

[10] See, for example, Aggravated Assault, Utah Code Ann. § 76-5-103 (Supp. 1989.); Aggravated Sexual Abuse of a Child, Utah Code Ann. § 76-5-404.1 (Supp. 1989); Aggravated Sexual Assault, Utah Code Ann. § 76-5-405 (Supp. 1989); Aggravated Burglary, Utah Code Ann. § 76-6-203 (Supp. 1989).

distinguishable where the federal Bank Robbery statute did not include the use of a firearm as an element of the offense and a separate and specific firearm enhancement penalty existed for Bank Robbery. The court held that where a specific firearm enhancement provision applied to the offense of Bank Robbery, a trial court could not additionally impose a firearm enhancement penalty applicable generally. Id. at 13.

In the present case, defendant was not subjected to a double firearm enhancement penalty when the trial court applied the firearm enhancement statute to his Aggravated Robbery conviction. The use of a firearm or other deadly weapon is an element of Utah's Aggravated Robbery statute, not an enhancement. Thus, the trial court's application of Utah's firearm enhancement statute to defendant's sentence for Aggravated Robbery was proper.

B. The Trial Court Could Properly Impose A Maximum Term Of Only Five Years For Use Of A Firearm.

Defendant asserts that even if the enhancement provisions of Utah Code Ann. § 76-3-203(1) (Supp. 1988) are applicable to his Aggravated Robbery conviction, the trial court erred in imposing a total of six years as an enhancement term. Respondent concedes that the trial judge abused his discretion by imposing a six-year enhancement term.

In State v. Willet, 694 P.2d 601 (Utah 1984), the Utah Supreme Court interpreted the firearm enhancement statute to provide a maximum enhancement term of five years. Willet, 694 P.2d at 603. In Willett, the court directed the district court

to reduce defendant's enhancement sentence from a total of six years, to a total of five years. Respondent requests this Court to affirm defendant's conviction and remand the case to the trial court with the instruction to impose an enhancement term of five years.

POINT VI

JURY INSTRUCTION #16 WAS NOT PREJUDICIAL WHEN CONSIDERING THE JURY INSTRUCTIONS AS A WHOLE.

Defendant argues that the trial court erred in giving Jury Instruction No. 16 because it was in part argumentative and improperly commented on the evidence. Defendant's claim is without merit.

In considering whether a jury instruction was proper, the Utah Supreme Court has stated:

> As we have reiterated innumberable times one instruction should not be considered in isolation in order to predicate a claim of error upon it, but the instructions must be read and understood as a connected whole.

Taylor v. Johnson, 18 Utah 2d 16, 414 P.2d 575, 577 (1966) (footnote omitted). The challenged instruction reads:

Instruction No. 16

> [Y]ou are instructed that every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct. Assisting a person who is known to have just committed a crime to flee from the scene of that crime would render one criminally liable for that crime to the same degree as the actual perpetrator.

(R. 245.)

Defendant does not allege the instruction misstated the law. Rather, he contends that the last sentence in the instruction was improper because "it is an application of the law to the facts of the case based on a particular theory of the case." (Br. of App. at 48.) However, the Utah Supreme Court has stated that the very purpose of jury instructions is to set forth the issues and the law applicable thereto in a clear, concise and orderly manner, so that the jury will understand how to discharge its responsibilities. State v. Torres, 619 P.2d 694, 696 (Utah 1980). The Utah Supreme Court has further stated that to accomplish this, a "trial court should mold the instructions to fit the facts shown . . . and blend the instructions to the facts disclosed by the evidence and make them clear in meaning and concise as possible. . . ." State v. Gallegos, 16 Utah 2d 102, 396 P.2d 414, 416 (1964).

During the trial, the jury heard extensive testimony from both the prosecution and defense on the issue of whether the defendant was a party to the armed robbery of King's Custom Jewelers. The prosecution's theory of the case was that the defendant drove the get-away car and otherwise aided in the robbery. The jury was instructed that in order to convict defendant of Aggravated Robbery, they must find beyond a reasonable doubt the following elements.

> 1) That on or about the 21st day of October, 1987, in Salt Lake County, Utah. John Humphrey unlawfully and intentionally took personal property which was there and then in the possession of another person;
> 2) That the taking was from the person or immediate presence of Karekine Karmillian:
> 3) That the taking was against the will of Karekine Karmillian;
> 4) That said taking was accomplished by the

5) That Charles Webb solicited, requested, commanded, encouraged or aided John Humphrey to act as described above.

(R. 251; Jury Instruction No. 22.) This jury instruction clearly mirrors the elements of Aggravated Robbery and party liability as set forth in Utah Code Ann. § 76-6-302 (1978) and § 76-2-202 (Supp. 1988). Viewing the instructions as a whole, the jury could not have been sufficiently confused or misled by Instruction No. 16 to the extent that they disregarded their duty to find each and every element of the offense beyond a reasonable doubt.

Further, defendant has failed to show how he was prejudiced by the instruction other than to state that it "pointed the jury toward the prosecution's theory of Mr. Webb's culpability." (See Br. of App. at 48.) Under such circumstances, reversal is not warranted because there is no reasonable likelihood of a different result in the absence of the alleged error. See State v. Fontana, 680 P.2d 1042 (Utah 1984); State v. Montague, 671 P.2d 187 (Utah 1983).

CONCLUSION

Based upon the foregoing, defendant's conviction should be affirmed and the case remanded to the trial court with instructions to impose a maximum five year firearm enhancement term.

RESPECTFULLY submitted this 25th day of July, 1989.

R. PAUL VAN DAM
Attorney General

DAN R. LARSEN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Samuel Alba, attorney for appellant, City Centre I, Suite 900 175 East Fourth South, Salt Lake City, Utah 84111, this 25th day of July, 1989.

ADDENDA

ADDENDUM A

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Respondent,

v.

Arthur Leonard Heaps,
Defendant and Appellant.

No. 16264

F I L E D
October 31, 1979

Geoffrey J. Butler, Clerk

CROCKETT, Chief Justice:

Defendant Arthur Leonard Heaps was convicted by a jury of burglary and theft,[1] both second degree felonies, and was sentenced on each charge to an indeterminate term of one to fifteen years, the sentences to run concurrently. On appeal, his contention is that he was denied the protections the law affords him, including effective assistance of counsel, both before and during his trial.

One of the state's witnesses, Don Allred, testified that about 1:00 p.m. on May 22, 1978, he arrived home after attending a funeral. He noticed two automobiles, a dark blue Ford Mercury sedan and a white Ford Mustang, parked on the street near the residence of his neighbor, Pat Abbott. Mr. Allred stated that he saw two men approach the house. One of them had fuzzy dark hair and a beard, the other was blond haired, and both men wore Levi's and t-shirts.

A short time later, he saw the two men leave the house carrying something in a long leather case and a television set. When they drove away, through a neighbor whose husband is a police officer, he relayed the information to the police. Shortly thereafter, on the basis of the description of the men and the cars involved, police Sergeant Lynn Turner stopped the defendant who was driving the blue Mercury sedan. He noticed some property in the front seat and on the floor of the vehicle, particularly a box with the barrel of a small rifle protruding through its top. Officer Dennis Davies joined Sergeant Turner, arrested the defendant and impounded the car. Mr. Abbott came to the impound lot and identified the items found in the blue sedan as being his. Officer Davies stated that he later inspected the Abbott residence and that the front door had been broken into.

The defendant's first assertion is that a conflict of interest existed during pre-trial proceedings because he and a co-defendant were both represented by attorneys from the Legal Defender's Association. The record indicates that at the arraignment, subsequent bond hearings and a preliminary

1. In violation of 76-6-202 and 76-6-404, U.C.A., 1953.

hearing in the circuit court, each defendant was represented by a different attorney from the Legal Defender's office. Both defendants were bound over to the district court to stand trial. On August 9, 1978, they moved to dismiss the charges on the grounds that: (1) a witness overheard testimony of other witnesses at the preliminary hearing after the exclusion rule had been invoked, and (2) their rights against double jeopardy were violated when a second preliminary hearing was held in the circuit court without the discovery of new or additional information. A motion to suppress evidence on the ground that it had been illegally obtained in a warrantless search of the two cars was also made on behalf of each defendant.

Before the court had heard those motions, co-defendant Richard Garrett pled guilty to the lesser included offense of attempted theft and, as to him, the burglary charge was dismissed. Concerning the defendant, the court denied the motion to dismiss, but no suppression hearing was held because the defendant was not present. Due to his failure to appear for trial on August 21, 1978, a bench warrant was issued and bail was forfeited. About three months later, on November 9, 1978, the defendant was apprehended and brought to trial on this charge.

The Legal Defender Association, through its director, moved to withdraw as counsel for the defendant, citing a conflict of interest since it was still representing the co-defendant in sentencing proceedings following his guilty plea. The motion was granted and defendant's present counsel was appointed to represent him at trial.

Significantly, the defendant never asked for different counsel at any time during the pre-trial proceedings and he never registered any dissatisfaction with the performance of his counsel until after he was convicted and sentenced. Although the defendant claims there was conflict of interest, he does not specify what it was, other than the fact that he was "represented in pre-trial proceedings by the Legal Defender's Association, who also represented the untried co-defendant" and that this "may require" reversal of his conviction and a new trial.

To prevail on his claim, it would be necessary for it to appear that there was a conflict of interest which in some manner may have reacted to the defendant's detriment.[2] Nothing of that character appears in this case and none can be presumed merely because different attorneys from the Legal Defender's office had represented defendant.[3]

2. State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966); State v. Gross, 221 Kan. 98, 558 P.2d 665 (1976); State v. Gutierrez, 116 Ariz. 207, 568 P.2d 1105 (1977).
3. See State v. Jelks, 105 Ariz. 175, 461 P.2d 473 (1969).

The defendant also asserts that, at trial, his attorney: (1) failed to attack the testimony of Mr. Allred, who described the two men he had seen near the Abbott residence, but did not, while testifying, identify the defendant as one of them; and (2) failed to object to the admission of photographs depicting the property located in the front seat and the trunk of the car the defendant was driving when he was arrested.

As we have heretofore stated, a defendant is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the accused and present such defenses as are available under the law and consistent with the ethics of the profession.[4] We have found in this record nothing to indicate that defendant was deprived of that entitlement.

As to (1) above, Mr. Allred gave a sufficient description of the two men and the cars they were driving that the police were able to apprehend the defendant with the stolen property in the car he was driving. This fact itself seems sufficient answer to defendant's belated contention that his counsel should have more thoroughly cross-examined Sergeant Turner.

As for (2) above, even if an objection that the evidence was obtained as a result of an illegal search and seizure had been made, it would not have been well-taken. Sergeant Turner had a sufficient description of the automobile and of the defendant to furnish him with probable cause to stop the car and investigate. The investigation justified the arrest and the seizure of the stolen property which was in plain sight.[5]

The photographs about which complaint was made were illustrative of material facts and no error was committed in receiving them in evidence.

Affirmed. No costs awarded.

This opinion is not regarded as adding anything significant to existing law and hence is not to be published in the Utah Reporter or Pacific Reporter.

WE CONCUR:

Richard J. Maughan, Justice

D. Frank Wilkins, Justice

Gordon R. Hall, Justice

Stewart, Justice, concurs in result.

4. Alires v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969); State v. McNicol, Utah, 554 P.2d 203 (1976).

5. See State v. Martinez, 28 Utah 2d 80, 498 P.2d 651 [illegible] Utah, 584 P.2d 836 (1978).

ADDENDUM B

PERMISSION TO SEARCH

I, RENEE GREGERSEN, have been informed by DET JACKSON and DET DAILING who made proper identification as (an) authorized law enforcment officer(s) of the ~~Midvale~~ SALT LAKE Police Department, ~~Midvale~~ SALT LAKE CITY, Utah, of my CONSTITUTIONAL RIGHT not to have a search made of the premises and property owned by me and/or under my care, custody and control, without a search warrant.

Knowing of my lawful right to refuse to consent to such a search, I willingly give my permission to the above named officer(s) to conduct a complete search of the premises and property, including all buildings and vehicles, both inside and outside of the property located at 111 W. WASATCH APT #14. The above said officer(s) further have my permission to take from my premises and property, any letters, papers, or any other property or things which they desire as evidence for criminal prosecution in the case or cases under investigation.

This written permission to search without a search warrant is given by me to the above officer(s) voluntarily and without any threats or promises of any kind, at 0810 A.M. on this 4TH day of NOV 1987 at 111 W. WASATCH

Signed Renee Gregersen

Witness: H Jackson
Address SLCPD
Phone (H) _____ (B) _____

Witness: [illegible]
Address SLCPD
Phone (H) _____ (B) _____